REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 4 OF 2020

(AS CONSOLIDATED WITH NRB HC PET. 102, 103,106,107,110,111 OF 2020 & GARISSA PET. 3 OF 2020

IN THE MATTER OF: ARTICLES;1,2,2(5),3,10,20,21,23,27,35,43,47,56,73,81,88,89(5),89(6),89(12),93(1), 156,159,160,165,174,188(2), 202,203,215,216,217,218,232,25, &260 & PART 2(8) OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 10,27,35,47,56,73,89,188,203 AND 216 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: STATISTICS ACT, NO. 4 OF 2006 AND THE CENSUS POPULATION ORDER 2018

IN THE MATTER OF: STATISTICS (AMENDMENT) ACT, NO. 16 OF 2019

IN THE MATTER OF: COUNTY GOVERNMENT ACT, 2012

IN THE MATTER OF: ACCESS TO INFORMATION ACT, NO. 31 OF 2016

IN THE MATTER OF: THE INDEPENDENT AND ELECTORAL AND BOUNDARIES COMMISSION ACT, NO. 9 OF 2011

IN THE MATTER OF: THE UNITED NATIONS PRINCIPLES AND RECOMMENDATIONS FOR POPULATION AND HOUSING CENSUS REVISION 3 OF 2017

IN THE MATTER OF: THE UNITED NATIONS GUIDELINES OF THE USE OF ELECTRONIC DATA COLLECTION TECHNOLOGIES IN POPULATION AND HOUSING CENSUS 2019

BETWEEN

HON ABDULLAHI BASHIR SHEIKH& 24 OTHERS…...……PETITIONERS

VERSUS

KENYA NATIONAL BUREAU OF STATISTICS……...……..1ST RESPONDENT

THE NATIONAL TREASURY &

NATIONAL PLANNING……..……..……2ND RESPONDENT

COMMISSION ON REVENUE ALLOCATION……...……..3RD RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDERIES COMMISSION…….……..……..……..4TH RESPONDENT

THE ATTORNEY GENERAL……..……..5TH RESPONDENT

RULING

Introduction:

1. The 1st-8th Petitioners are the Members of Parliament from Mandera County, the County Government of Mandera and the Governor Mandera County, the 9th-15th Petitioners are the Members of Parliament from Wajir County, the County Government of Wajir and the Governor Wajir County, the 16th-21st Petitioners are the Members of Parliament from Garissa County, the County Government of Garissa and the Governor Garissa County and the 22nd -25th petitioners herein describe themselves as the residents of Mandera County.

2. The 1st Respondent is a statutory body established under section 3 of the Statistics Act, 2006, and its role among others is to conduct the population and housing census every ten years and such other censuses and survey.

3. The 2nd Respondent is the National Treasury created and derives its mandate from the Constitution, the Public Finance Management Act and is the line ministry responsible for National Planning and the data generated by the 1st Respondent, which also falls under it.

4. The 3rd Respondent is established under Article 216 of the Constitution and is to make a recommendation concerning the basis for equitable sharing of revenue raised by the national government between national government and county government and among counties.

5. The 4th Respondent is established under Article 88(1) of the Constitution with powers to conduct elections as prescribed by Article 88(4) thereof and other written laws and has the Constitutional mandate to undertake delimitation of boundaries for all constituencies and wards and one of the factors considered is the population census report obtained from the 1st Respondent.

6. The 5th Respondent is the Principal legal adviser to the Government.

7. The Petitioners in their case state that the 1st Respondent conducted the 2019 Kenya Population and Housing Census (KPHC) in the week of 24th-31st August, 2019 and released a report published on 4th November, 2019, which main objective was to collect information on the size, composition, distribution and socio-economic characteristics of the population of Kenya.

8. The petitioners contend that the 2019 Kenya Population and Housing Census (KPHC) results as published are at variance with the actual enumerated and transmitted results from all the enumerated areas and have no correlation with the actual enumerated figures for Mandera, Wajir and Garissa Counties.

9. They have listed several areas where they allege that the variance between the enumerated and released census results exists. In Mandera County the variance is at -905, 291, Garissa County a variance of -537,575 and Wajir County -830, 762 people.

10. In addition, the petitioners allege that the 1st Respondent contrary to the 2009 census results, rushed to release the 2019 results without undertaking post-Enumeration Survey contrary to the law and the Principles and recommendations espoused by the UN Best practices thus compromising the quality, credibility and reliability of the 2019 KPHC report.

11. Further, they allege that the published report was not based on the lowest enumeration units or administrative units created under section 48 of the County Government Act, (sub-counties equivalent to Constituencies and the wards created under Article 89 of the Constitution) but irregularly based on administrative units wrongly baptized as ‘sub counties contrary to the law.

12. Furthermore, the petitioners allege that the census results demonstrate the 1st Respondent consistent attempt to suppress the enumerated census results for their counties, which action can be traced to the cancelation of census results for some areas in the 2009 census results and the subsequent attempt to reduce their population in 2016, which action was litigated and stopped by the court of Appeal.

13. The Petitioners sought various prayers in their Petition, namely, a declaration that the results published by the 1st Respondent with respect to the specified areas within Mandera, Wajir and Garissa Counties did not reflect the correct enumerated population of the residents in these Counties, and that the publication and circulation of incorrect census results subverts Article 10, 35 and 73 of the Constitution and therefore null and void.

14. An order of Mandamus directing the 1st Respondent to secure and avail all the mobile devices (tablets), storage cards used to enumerate and transmit results deployed in the listed areas between 24th and 31st August 2019 for purposes of scrutiny and verification of results, produce all the copies of the opening reports of all mobile devices (tablets) deployed in all enumeration areas herein, produce all the copies of the Daily Transmission Reports for each mobile device (tablet) deployed in all enumeration areas.

15. Additionally, they sought for an order of Certiorari removing to this Honourable Court to quash the results published in Volume 1 of the 2019 KPHC with respect to the listed areas in the petitioners’ counties of Mandera, Garissa and Wajir.

16. An order of Mandamus directing and compelling the 1st Respondent to publish and circulate the correct results on the basis of the correct transmitted results from all the enumeration areas.

17. An order of prohibition prohibiting the 1st Respondent from circulating the incorrect, adjusted and/or altered figures for the listed Counties published in November 2019 or any other figures other than the actual enumerated population and Housing Census results to the Independent Electoral and Boundaries Commission, the National Assembly, the Senate, the National Treasury or any other organ of the government, Constitutional Commissions, offices or organizations for purposes of delimitation of boundaries and for any other administrative intervention.

18. Pending the hearing and determination of the petition, the Petitioners filed their respective Notice of Motions, the 1st to 6th Petitioners motion is dated 9th March, 2020 and supported by an affidavit sworn by Hon. Abdullahi Bashir Sheikh, the 7th and 8th motion also dated 9th March, 2020 is supported by an affidavit sworn by Hon Ali Ibrahim Roba, the 9th to 13th Petitioners motion is dated 12th March, 2020 and supported by the affidavits of each of the petitioners, the 14th and 15th Petitioners motion is also dated 12th March, 2020 and supported by the affidavit of Hon. Mohamed Abdi Mohamud, 16th to 19th Petitioners motion is dated 12th March, 2020 and supported by the affidavit of Hon. Abdi Omar Shurie, the 20th and 21st petitioners motion is also dated 12th march, 2020 and supported by affidavit sworn by Hon. Ali Bunow Korane and the 22nd and 25th Petitioners motion dated 12th May, 2020 is supported by an affidavit sworn by Abdullahi Kanyare.

19. The Notice of Motion applications filed by the Mandera and Garissa County Governments and the Members of Parliament dated 9th March 2019 and 12th March 2020 respectively (that is 1st-8th and 16th-21st Petitioners) seek the following prayers;

i) spent

ii) THAT this Honourable Court do grant a conservatory order restraining and prohibiting the 2nd and 3rd Respondents from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th November 2019 in the determination of division of revenue between National and County Government or in the formulation of any policies, reports and/or recommendations pending the hearing and determination of the petition.

iii) THAT this Honourable Court do grant a conservatory order restraining and prohibiting the 4th Respondent from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th November 2019 in the delimitation of boundaries pending the hearing and determination of the petition.

iv) THAT this Honourable Court do issue an order for scrutiny under the court's supervision of all the tablets and storage chips used and deployed in all enumeration areas in Mandera West, Banisa, Lafey, Mandera East and Mandera North sub counties and Garissa Township, Balambala, Lagdera and Dadaab sub counties to determine the correct enumerated data transmitted to the 1st Respondent's central servers.

v) THAT this Honourable Court do issue an order that the Petitioners Information Technology experts be granted access to the 1st Respondent's servers for purposes of scrutiny to determine the actual results transmitted from all the enumeration areas in Mandera West, Banisa, Lafey, Mandera East and Mandera North sub counties and Garissa Township, Balambala, Lagdera and Dadaab sub counties between the periods of 24th August 2019 to 31st August 2019.

vi) THAT directions be given for expeditious hearing and determination of the substantive petition owing to the urgency of the matter.

vii) THAT costs of this application be provided for.

20. The 9th to 15th Petitioners application seeks the following orders:

1) Spent

2) THAT this Honourable Court do grant a conservatory order restraining and prohibition the 3rd Respondent from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census(KPHC) results for Eldas, Tarbaj, Wajir East, Wajir West and Wajir North 'sub counties 'Constituencies) published by the 1st Respondent on the 4th November, 2019 in the determination of the population quota under Article 89(12) of the Constitution or in the delimitation of boundaries pending the hearing and determination of the petition.

3) THAT, this Honourable Court do issue an order for scrutiny under the court's supervision of all the tablets and storage chips used and deployed in all enumeration areas of Eldas, Tarbaj, Wajir East, Wajir West and Wajir North 'sub counties'(constituencies) to determine the census results transmitted to the 1st Respondent's central servers.

4) THAT, this Honourable Court do issue an order that the petitioners information technology experts be granted access to the 1st Respondent's servers for purposes of scrutiny to determine the actual results transmitted from all the enumeration areas in Eldas, Tarbaj, Wajir East, Wajir West and Wajir North 'sub-counties' Constituencies between the periods 24th August, 2019 to 31st August, 2019.

5) THAT, directions be given for expeditious hearing and determination of the substantive petition owing to the urgency of the matter.

6) THAT cost of this application be provided for.

21. However, for petitioner No. 14 there was additional prayer for, " ***….court do grant a conservatory order restraining and prohibiting the 2nd and 3rd Respondents from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th November 2019 in the determination of division of revenue between National and County***

Government or in the formulation of any policies, reports and/or recommendations pending the hearing and determination of the petition."

22. The 22nd to 25th Petitioners herein application seeks the following orders THAT;

1) Spent

2) This Honourable Court do grant a conservatory order restraining and prohibiting the 2nd and 3rd Respondents from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th of November 2019 in the determination of the division of revenue between National and County Government or in the formulation of any policies, reports and/or recommendations pending the hearing and determination of this petition.

3) This Honourable Court do grant a conservatory order restraining and prohibiting the 4th respondent from relying on, utilizing or in any way using 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th November 2019 in the delimitation of boundaries pending the hearing and determination of the petition.

4) This Honourable Court do issue an order under the Court's supervision of the tablets and storage chips used and deployed in all enumeration areas in Mandera East, Mandera West, Banisa, Lafey, Mandera North and Mandera South sub counties to determine the correct enumerated data transmitted to the 1st Respondent's central servers.

5) This Honourable Court do issue an order that the petitioners Information Technology experts be granted access to the 1st Respondents servers for purposes of scrutiny to determine the actual results transmitted from all the enumeration areas in Mandera East, Mandera West, Banisa, Lafey, Mandera North and Mandera South sub counties between the periods 24th August 2019 to 31st August 2019.

6) Directions be given for expeditious hearing and determination of the substantive petition owing to the urgency of the matter.

7) Costs of this application be provided for.

23. In response to the applicant's petitioners' applications herein, the Respondents filed their respective responses. The 1st Respondent filed two affidavits in opposition to the applications. They are the replying affidavit sworn by Mutua Kakinyi on 12th June, 2020 a Senior ICT manager and another one by the Zachary Mwangi sworn on even dates, who is the Director General of the 1st Respondent.

24. The 2nd Respondent filed a replying affidavit sworn by Dr. Julius Muia the Principal Secretary at the National Treasury, sworn on 12th June, 2020. The 3rd Respondents on their part also filed a replying affidavit sworn by Dr. Moses Muse Sichei, the Commission Secretary dated 12th June, 2020 in opposition to the petitioner's applications.

25. The 4th Respondent on their part filed a replying affidavit sworn by Marjan Hussein Marjan the 4th Respondent Acting Chief Executive Officer in opposition to the petitioner's applications. The Attorney General the 5th Respondent also filed a replying affidavit sworn by Kennedy Ogeto, the Solicitor-General dated 12th June, 2020 in opposition to the instant applications.

26. Both sides parties filed their respective submissions and highlighted the same on 17th June, 2018 when the matter came up for hearing.

The Applicants' Case:

27. The summary of the applicants case is that they are challenging the 1st Respondent 2019 Kenya Population and Housing Census(KPHC) on several grounds and allege that the results as published for the three counties of Mandera, Garissa and Wajir were incorrect and are urging this court vide the sought conservatory orders to stay the process of the determination of the division of revenue between National and County Government to ensure that its adjudicatory function is preserved and ensure that the petition is not rendered nugatory and mere academic exercise.

28. Secondly, they seek the court to prohibit the 4th Respondent from using the contested figures to undertake delimitation of boundaries which is based on population quota as provided for under Article 89(12) of the Constitution pending the hearing and determination of this petition.

29. And thirdly they are seeking for an order of scrutiny and access to information under Article 35(1) of the Constitution to access the gadgets used by the 1st Respondent in the contested areas within the three counties.

30. During the hearing of this applications and highlighting of submissions, Counsel Mr. Issa Mansur submitted on behalf of the 1st-8th and 16th-21st Petitioners applicants, Mr. Biriq submitted on behalf of the 9th-15th Petitioners applicants and Mr. Khaemba submitted on behalf of the 22nd -25th Petitioners applicants.

31. Counsel Mr. Issa Mansour submitted that the 1st-8th and 16th -21st applicants have a legitimate case for the grant of the orders sought herein, in that they have established a prima facie case with high chances of success and deserving this court protection as the 1st Respondent has acted in violation of the Constitution, the fundamental principles of Official Statistics under the Statistics Act, 2006 by publishing incorrect figures for the counties of Mandera and Garissa.

32. In respect to the jurisdiction of this court to issue the sought conservatory orders, they submitted that the court has the jurisdiction pursuant to Article 23 (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of the Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules). They relied in the cases of **Gatirau Peter Munyya vs Dickson Mwenda Githini & 3 others [2014] eKLR, Kevin Mwiti & Others vs Kenya School of Law & Others [2015] eKLR** and **the Kenya Association of Manufacturers & 2 Others vs Cabinet Secretary-Ministry of Environment and Natural Resources & 3 Others [2017].**

33. They identified the following as the germane issues for determination before this court. The first one is on whether the petition herein raises a prima facie case with probability of success, and in this regard, they relied in the Court of Appeal decision in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2017] eKLR** to define what a prima facie case entails.

34. Counsel submitted that the 1st Respondent in undertaking the 2019 KPHC , adopted the use of technology in an opaque manner without any statutory framework, and that there was no public participation contrary to Article 10 of the Constitution, section 17 of the Statistics Act and Principle 7 of the United Nations Fundamental Principles of Official Statistics which provides that ' the laws, regulations and measures under which the statistical systems operate are to be made public', and that there was no provision either in the Statistics Act or the census population order 2018 on the use of mobile technology.

35. They submitted that the 1st Respondent breached **paragraphs C.21, C.22, C.239, C.240**, **C.241, C.242** and **C.296** of the United Nations Guidelines on the Use of Electronic Data Collection Technologies in the 2019 Population and Housing Census, as the same did not meet public participation demand., which is a key component of the Kenya 2010 Constitution.

36. In this they relied in the case of **British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & Another (Interested parties): Mastermind Tobacco Kenya Limited (the Affected party) [2019] eKLR**.

37. It is their submissions that based on the above omissions; their petition raises several weighty Constitutional issues on the manner in which the census was undertaken to warrant the grant of the herein sought conservatory orders.

38. The second issue identified by the 1st-8th and 16th-21st Petitioners applicants is whether the conservatory orders sought should be granted, and in this regard they submitted that the impugned 2019 census results as released by the 1st Respondent will irreparably violate the rights of the residents of Garissa and Mandera Counties to equitable allocation of revenue under Article 202 and 216 of the Constitution.

39. This is so as they stand to lose Kshs.1 Billion and 1.3 Billion respectively, and that even though the Division of Revenue Act has been passed, the County Allocation of Revenue Act is still pending before the senate, and therefore this court is still within the jurisdiction to grant the appropriate relief by way of conservatory order, which if not granted would prejudice the applicants as once funds are disbursed the same cannot be recalled and redistributed by the National Treasury.

40. Therefore, in the circumstances the balance of convenience tilts in their favour in a bid to preserve the subject matter of the petition. And that if the orders are granted the budgetary process will not be imperiled in view of the findings by the **Supreme Court Advisory Opinion Reference No. 3 of 2019.**

41. It is their submission that public interest favors the issuance of the sought conservatory orders as there is real danger that the senate will proceed and adopt the 3rd formula basis for revenue allocation and pass the County Allocation of Revenue Act to the detriment of the petitioners, as the said formula will be in place to the financial year 2023/2024.

42. In this respect they submitted that the orders sought are *in rem* and therefore it can be used to stop the senate from enacting the County Allocation of Revenue Act using the 2019 KPHC results, even though the Senate is not a party in these proceedings.

43. The third issue addressed by the 1st-8th and 16th-21st Petitioners applicants is the issue of scrutiny, which they submit is part of access to information and has its roots in Article 10 and 35 of the Constitution, which provides a normative principle of accountability as was settled by the Supreme Court in the case of **Raila Amollo Odinga and Another vs Independent Electoral and Boundaries Commission and 2 others [2017] eKLR.**

44. They submitted that the results published by the 1st Respondent for the 2019 KPHC are at variance with the actual enumerated and transmitted results from all the enumerated areas and have no correlation with the actual enumerated figures for Mandera and Garissa Counties. They also pointed out omissions from the 1st respondents and grounds which they believe gives credibility to their case.

45. They submitted that pursuant to the amendment of the Statistics Act to introduce section 23(3) and (4) that provides that the Cabinet Secretary with approval of the cabinet may cause any official statistical data collected, analyzed and disseminated by the bureau to be cancelled, varied or adjusted the same is an acknowledgement of the many mistakes by government that may be made in the census process.

46. They relied in a report by Mr. Sammy L. Oyombe, the Managing Consultant of Analytic & Strategies Limited (ANASTRA) and Professor Wafula Masai of the School of Economics , University of Nairobi which is an Evaluation of the Kenya Population and Housing Census , 2019 results for Garissa, Mandera and Wajir, which report finds that due to poor network connectivity in the areas and vastness

therefore most enumerators failed to transmit data to the 1st Respondent central servers, in the following area of Mandera West, Banisa, Lafey, Mandera East, Mandera North and Mandera South sub counties.

47. Thus, estimate that there was a variance of over 400,000 people in the results released by the 1st Respondent, and therefore the applicants pursuant to Article 35 of the Constitution have a right to the correction or deletion of untrue and misleading census figures which affects their rights to resource allocation as envisaged under Article 202 and 216 of the Constitution and representation vide delimitation of boundaries yet to be undertaken by the 4th Respondent.

48. Additionally, they submitted that unlike the 2009 KPHC, the 2019 KPHC was distinctively different as there was higher public participation, more public awareness on the relevance of the census to development, representation and allocation of resources, and that the 1st Respondent worked closely with members of National Assembly and other elected officials of Mandera and Garissa counties in a bid to ensure that the enumeration exercise was credible and run smoothly.

49. And as a result the census officials in Mandera and Garissa voluntarily disclosed to the leaders the actual figures that were enumerated on the ground and transmitted to the 1st Respondent Central servers, which information they submit was disclosed in public interest pursuant to the provisions of section 16 of the Access to Information Act, and therefore the said officials cannot be said to have breached their oath of secrecy. It is the said figures that points to the variance creating doubts to the 1st Respondents census results.

50. They submitted that they have demonstrated the variance between the enumerated figures and the 1st Respondent released figures, which raises a lot of doubt, for instance in Mandera the actual enumerated figure was 1,772,708 yet the published figure is 867,457 a variance of 905,281, and for Garissa County the actual enumerated figure was 969,313 people and the released figure by the 1 st Respondent is 431, 738 a variance of 537, 575.

51. Further, they submitted that the numbers published by the 1st respondent in 2019 KPHC is less than the one for the year 2009, for instance in 2009 the population of Mandera was reported to be 1,025, 756 and in 2019 which is 10 ten years later is 867,457.

52. That, nothing was given by the 1st Respondent attributed for the catastrophic decline, despite the progress brought about to the county by devolution which improved standard of health and medical facilities, higher birth rates and lower infant and child mortality rate in 2019.

53. This is also the case for Garissa where in 2009 the population was reported to be 623,060 and in 2019 it rose to 841,353 which according to them is an insignificant increase despite the investments and developments attributed to devolution.

54. Furthermore, they submitted that the suppression of their population is part of the 1st Respondent persistent scheme which began in the 2009 KPHC and the April 2016 attempt to reduce the population, all of which were subject to numerous successful litigation in the court and therefore the 2019 KPHC is the latest attempt by the 1st Respondent to delegitimize the 2009 enumerated census results for the Counties of Garissa and Mandera.

55. Moreover, they submitted that the 1st Respondent report on the census of Mandera and Garissa as released cannot be justified as per the **2014 Demographic and Health Survey** and the **2015/2016 Kenya Integrated Household Budget Survey (KIHBS),** which report confirm that the household numbers, size and birth rates in Garissa, Wajir and Mandera were higher than the rest of the Country.

56. In answer to the 1st Respondent response that they ought to have made their application for scrutiny and access to information before the Commission on Administrative Justice (CAJ) to review the 1st respondent refusal to allow access pursuant to section 14 of the Statistics Act, the applicants submitted that the same was not a precondition before approaching this court.

57. This is so as this court has unlimited jurisdiction pursuant to Article 165 of the Constitution and as was held by **Justice Mwita** in the case of **Katiba Institute vs Presidents Delivery Unit & 3 others [2017] eKLR.**

58. They also submitted that Article 35(1)(a) and (b) of the Constitution as read with section 3 of the access to information Act shows that without equivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 1st respondent as was held in **Rev. Timothy Njoya vs Attorney General Another [2014] eKLR.**

59. In sum, the petitioners urged the court to grant the order for scrutiny as sought and advance the national principle of integrity, transparency and accountability. And to grant the conservatory orders sought.

60. The 9th to 15th Petitioners applicants' submissions were urged by Counsel Mr. Biriq. He adopted the submissions advanced on behalf of the other petitioners as articulated by Mr. Issa.

61. Counsel urged and reiterated their case for scrutiny, stating that they had written to the 1st Respondent vide a letter dated 2nd, 3rd and 4th December, 2019 to provide them with information, being the daily transmission of the census from Eldas, Tarbaj, Wajir East, Wajir West and Wajir North Sub-counties/constituencies pursuant to Article 35 of the Constitution, section 23 of the Statistics Act and section 9 of the Access to Information Act.

62. However, the 1st Respondent denied them the same vide a letter dated 9th December, 2019 which denial had no basis and submit contravenes Constitution the Access to Information Act 2016 and the Statistics Act 2006.

63. They submitted that the clamor for secrecy by the 1st Respondent may have been motivated by an underlying problem with the information, the urge to hide the information from the public or because of the ignorance of the fact that there is no bar to disclosure both in the Constitution and the Access to Information Act 2016 and the Statistics Act 2006.

64. And that their opposition to scrutiny is borne out of the realization that the Constitutional vision and values of openness, accountability and responsiveness will expose their unlawful activities. In this they referred the court to the words the Chief Justice of South Africa in the case of **My Vote vs Minister of Justice & Correctional Services & Another, Constitutional Court case CCT/249/17** where he stated:

> ***"If secrecy thrives, then our Constitutional project would be at risk of being betrayed or shipwrecked."***

65. They submitted that the Petitioners participated in the 2019 Kenya Population and Housing Census as the local leaders and were themselves counted in their respective sub-counties/constituencies. They averred that the census data was collected and captured daily in a mobile device (tablet or gadget) over a period of seven (7) days from 24th to 31st August, 2019 and that the daily enumerated figures were transmitted to a central server.

66. Each 1st Respondent's Content Supervisor would receive a successful transmission notification and an acknowledgement receipt of the summary of the data transmitted to the central server. This means that each Content Supervisor would know and have the 2019 Kenya Population and Housing Census results for his/her sub-county.

67. It is their case that the 2019 KPHC results published by the 1st Respondent in November 2019 should naturally be a reflection of the census results transmitted from the Petitioners' respective sub-counties. This however was not the case in their view as the census results published by the 1st Respondent has no correlation to the census data collected, captured and transmitted to the central server.

68. The actual enumerated population and housing figures/results and transmitted from the Petitioners' sub-counties to the central server are greatly at variance with the published 2019 KPHC results. They allege that the Respondents deliberately suppressed, manipulated and/or lowered the 2019 population and housing census for Eldas, Tarbaj, Wajir East, Wajir West and Wajir North Sub-counties/constituencies through the so-called smoothening.

69. Further, they submitted that the 2019 KPHC census results cannot be supported by any data on population growth and dynamism that will support the decline in the population, in that the 2014 Kenya Demographic and Health Survey (page 463) and the 2015-16 Kenya Integrated Household Budget Survey (page 509) show that the population growth trend and dynamism for the counties of Wajir, Mandera and Garissa as having;

> ***a) The largest household sizes in the country;***
>
> ***b) The highest fertility rate in the in the country;***
>
> ***c) The largest growth rate in the country. This inter-censual growth rate has been the highest in the country since 1989;***
>
> ***d) The lowest use of family planning method or contraceptives in the country at 3% with some parts of the country having over 73% use of contraceptives;***
>
> ***e) The highest prevalence of the practice of polygamous marriages in the country;***
>
> ***f) The highest rate in early marriages in the country;***
>
> ***g) The highest rate of illiteracy in women translating to higher number of children per woman in the country;***
>
> ***h) And noting that with devolution, the population have access to better health services infrastructure and other improved public services.***

70. They submit that they are entitled to receive the requested information and all the relevant material because of the following reasons;

> *(i) It is their Constitutional right to demand and receive information held by the state unconditionally;*
>
> *(ii) The right to obtain the information is necessary for the protection and exercise of other constitutional rights such as the entitlement to a fair share of the resources and the right to fair political representation. Without a scrutiny of the data and full disclosure, the constitutional prohibition against a public agency's arbitrary and inequitable distribution of financial and other material resources fairly between regions/counties in Kenya will have been violated;*
>
> *(iii) Information is a basic requirement for the functioning of an open political system and there is need to uphold the paramount values of transparency, accountability, responsiveness and openness underpinning participatory democracy –conditions without which the Petitioners will not be able to exercise or enforce essential economic, political and social rights. The information is also an important tool for countering pervasive culture of secrecy and arrogance, abuse of power, mismanagement, and corruption;*
>
> *(iv) The right to information is recognized as a fundamental human right, under the Universal Declaration on Human Rights to which Kenya is a signatory under Article 2 (5) of the Constitution;*

(v) It is in the public interest to review and scrutinize the census data transmitted form for the sub-counties of Eldas, Tarbaj, Wajir East, Wajir West and Wajir North to test whether the ICT system deployed and used by the 1st Respondent had ever worked as it should. It is a constitutional requirement that the taxpayer oversights public functionaries on the prudent use of public resources, and in any event the Constitution does not insulate the work of the Respondents from scrutiny and review;

(vi) The Petitioners' fundamental constitutional right to fair trial rests on access to the information held by the Respondents. To borrow the words of the Deputy Chief of Justice of South African in **Independent Newspapers (pty) Ltd v Minister for Intelligence Services; in re Masetlha v President of the Republic of South Africa (2008) ZACC 6 at para 25;**

> ***"ordinarily courts would look favorably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honored part of a litigating party's right to a fair trial."***

71. Furthermore, it is their submissions that the right to information represents an essential ingredient in the proper functioning of substantive as well as procedural democracy, and that access to information is a necessary condition for the exercise of other human and civil rights.

72. Accordingly, the potential political, social and economic impact upon the Petitioners will be catastrophic if the requested information is not given through a court supervised scrutiny. They relied in the case of **Katiba Institute v Presidents Delivery Unit & 3 others (supra)**, where **Hon. Justice Mwita** stated that;

> ***"31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body."***

73. Further, they relied in authorities from the Constitutional Court of South Africa where the access to information provisions in their Constitution is similar to our Constitution. These are the cases of **My Vote Counts NPC vs Minister of Justice & Correctional Services** and **Anor, Case SST 249/17, Helen Suzman Foundation v Judicial Service Commission & Anor, Case CCT 289/16.**

74. Counsel Mr. Khaemba submitted on behalf of the 22nd to 25th Petitioners, where he adopted the submissions of the other petitioners' hereinabove. It is their submissions that the census results as published by the 1st Respondent did not reflect the true and correct enumerated population for Mandera East, Mandera West, Banisa, Lafey, Mandera North and Mandera South Sub Counties, which has a variance of 905, 219 people.

75. Counsel submitted that this court has the jurisdiction to issue the sought conservatory orders pursuant to Article 23(3) (c) and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

76. Relying in Justice Onguto statement on the threshold for the grant of conservatory orders in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR,** they first submitted that they have established a prima facie case as they have tabled evidence showing the discrepancies between the enumerated and published census result**.**

77. Secondly, Counsel submitted that if this court does not issue the sought conservatory orders the whole petition and its substratum would be rendered nugatory and the ultimate ends of Justice would not be achieved, more so given the fact that the 3rd Respondent used the impugned 2019 KPHC report to make recommendation concerning the basis for equitable sharing of revenue raised by the National Government between National and County Government for the financial year 2020/2021.

78. In respect to the 4th respondent, they submitted that if the orders sought are not granted the delimitation of boundaries under Article 89 of the Constitution would be prejudicial to them as they intend to use the impugned 2019 KPHC, and therefore this Court ought to issue an order prohibiting the use of the same pending the hearing and determination of this petition.

79. The third aspect urged by Counsel is the issue of public interest, which they submitted it accords with constitutionalism and does not seek refuge in the breach of the law and that it would defeat the very principles of equity, equality and sustainable development as enshrined in Article 10 of the Constitution if the 3rd and 4th Respondents were to be allowed to use the impugned 2019 KPHC results. In this they relied in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (supra).**

80. The final issue addressed by Counsel is the issue for orders for scrutiny, they submitted that common law depicts that for a court to grant an order for scrutiny, there must be sufficient cause and the application seeking such orders should be clear, concise and specific as was held in **Philip Munge Ndolo vs Omar Mwinyi Shimbwa & 2 others [2013] eKLR.**

81. It is their submissions that based on the Report on the Evaluation of the Kenya Population and Housing Census 2019 Results for Garissa, Mandera and Wajir Counties by the Analytics & Strategies Limited (ANASTRA) dated January, 2020 there is sufficient reason for this court to allow for scrutiny under the court supervision due to the glaring differences and the gravity of the issues raised.

82. In sum it is the petitioner's applicants' case that this court ought to allow their application with costs.

1st Respondent's Case:

83. The 1st Respondent vide their Replying affidavits and filed written submissions opposed the petitioner's applicants' applications. Counsel Mr. Nyamodi and Ms. Ndong submitted on behalf of the 1st Respondent.

84. The 1st Respondent in their submissions identified four issues for determination. The first issue addressed my Mr. Nyamodi is as to whether this court was clothed with the jurisdiction to hear and determine the instant applications.

85. In this regard they submitted that the applicants' application and petition has been filed pursuant to Articles 23 (1), 35 and 258 of the Constitution, Rules 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) and Sections 4, 8 and 9 of the Access to Information Act and clearly seeks to enforce the right of access to information that is collected pursuant to the Statistics Act.

86. It was submitted by Counsel Mr. Nyamodi that in view of the totality of the pleadings filed before Court by the 1st Respondent there was sufficient public participation and as such this constitutional imperative was met and that the petitioners seem to be challenging the sufficiency of the same and they will at the hearing of the main petition demonstrate that indeed they were within the confines of the law.

87. It is their case that the right of access to information is enshrined in Article 35 of the Constitution and is given effect by the Access to Information Act, No. 31 of 2016. And that Section 8 of the Access to Information Act provides for the procedure for applying for information such as that sought by the Applicants herein, and upon receipt of the application, a public entity is mandated by Section 9 of the Access to Information Act to process it and make a decision on the same within 21 days of receipt.

88. Additionally, they submit that Section 14 of the Access to Information Act provides for the review of decisions in relation to an Application for access to information by the Commission on Administrative Justice (CAJ), and that such application for review shall be made within 30 days, or such further period as the Commission on Administrative Justice may allow from the day on which the decision is notified to the applicant.

89. It is their case that in the petitioners' instant case the 1stRespondent has demonstrated vide the Replying Affidavit sworn by Zachary Mwangi sworn on 12th June, 2020 that the 1st Respondent received the Applicants' applications, processed them and made a decision on the same as required under the law.

90. Therefore, upon receipt of the 1st Respondent's decision the Applicants recourse as provided for was to apply for review to the Commission on Administrative Justice, which under section 23 (2) and (5) of the Access to Information Act is given the authority to order the public body to release the sought information and whose decision is enforceable like an order of the High Court.

91. In this regard they submitted that the instant applications as filed are incompetent being contrary to the provisions of the Access to Information Act which requires an applicant to approach the Commission on Administrative Justice as a condition precedent to invoking this Honorable Court's jurisdiction to hear and determine the Petitions and Applications seeking access of information under Article 35(1) of the Constitution, alleging that they breach the exhaustion principle as held in the case of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR and in Republic v National Environmental Management Authority [2011] eKLR.**

92. The 1st Respondent although admitting that there are exceptions to the above process as was held in **Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020]eKLR** which attempted to distinguish the case of **Katiba Institute vs Presidents Delivery Unit & 3 others [2017] eKLR** relied by the applicants, they submitted that the applicants have not met the said exceptions and therefore they ought to have first approached the Commission on Administrative Justice.

93. Furthermore, they submitted that failure to follow the procedure set out in the Access to Information Act is not a procedural technicality, excusable by Article 159 (2)(d) of the Constitution and relied in the case of **James Muriithi Ngotho & 4 Others vs Judicial Service Commission [2012] eKLR** where the Court held that a requirement imposed by substantive law cannot be said to be a procedural technicality. They urged the court to find that it does not have the jurisdiction to consider the application for access to information.

94. The second issue addressed by Counsel is as to whether the Applicants have a right to access the information sought. They submitted that for the applicants to have a right to access information they must show that they need the information for the exercise or protection of another right as was held in **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others [2013] eKLR.**

95. In this case they submitted that from the petition and the application herein there is nothing to show that the applicants are seeking a recount/re-enumeration of the residents of Mandera, Garissa and Wajir Counties to establish the actual populations in these Counties, but are actually seeking the same to justify and defend the use of the census results of the 2009 Kenya Population and Housing Census.

96. That they have not demonstrated with a degree of precision the right which they seek to exercise or protect through access to the 1st Respondent's servers and the manner in which the information being held by the 1st Respondent shall assist them exercise or protect their right under the Constitution.

97. Additionally, they submitted that the right of access to information is not absolute and may be limited by the provisions of **Article 24 of the Constitution** and **Section 6 of the Access to Information Act.** They rely in the case of **Mercy Nyawade vs Banking Fraud Investigations Department & 2 others [2017] eKLR.**

98. Further, they submitted that the information sought by the applicants are within the prohibited and protected information envisaged under

the Statistics (Census of Population) Order, 2018, Data Protection Act and the United Nations Fundamental Principles of Official Statistics, which information relate to personal data which includes names, sex age, religion, marital status and place of residence and children information.

99. And therefore, granting the orders sought in the Applications herein shall violate the confidentiality of the 1st Respondent's and jeopardizes the personal information of Kenyan Citizens contained in the mobile devices and the servers in form of micro data.

100. It may also pose serious security challenges as the GPS location of each and every house in those sub-counties will be unlawfully exposed.

101. Moreover, they submitted that the nature of the access sought by the Applicants is not contemplated under the relevant substantive law and is thus unsanctioned.

102. That the information sought by the Applicants relates to legitimate interests protected by Section 6 (1) (i) of the Access to Information Act and disclosure of the information threatens to cause substantial harm to that interest, and the harm to the interest is greater than the Applicants' interest in receiving the information.

103. The information is also restricted under section **22** of the said Act restricts the disclosure of information in the following terms:

> **(1) No person shall publish or show to any other person not employed in the execution of a duty under this Act any of the following-**
>
> **(a) an individual return or part thereof made for the purposes of this Act;**
>
> **(b) an answer given to any question put for the purposes of this Act; or**
>
> **(c) a report, abstract or other document containing particulars comprised in any such return or answer so arranged as to identify such particulars with any person or undertaking, except with the prior written consent of the person making the return, or giving the answer, or, in the case of an undertaking, the owner, for the time being, of the undertaking.**
>
> **(2) The provisions of this Act shall not affect any law relating to the disclosure of any official secret or confidential information or trade secret. [Emphasis]**

104. The third issue addressed by the 1st respondent is as to whether the orders sought can be granted at an interlocutory stage. In this regard they submitted that the orders sought in the applications are final in nature and effect and granting the same would have the effect of determining the main Petitions at an interlocutory stage without the same being heard on their merits.

104. In the circumstances the prayers sought can only be granted upon the full hearing of the Petitions upon appreciation of the evidence. In this case they submit that there is no special circumstance to warrant the issuance of the sought orders. In this they rely in the case of **Olive Mugenda & Another vs Okiya Omtata Okoiti & 4 Others [2016] eKLR**.

104. They urged the court to disallow the application as the Applicants have failed to establish an undoubted nexus between the need for limitation of the right to privacy and the Applicants' personal interests.

105. The final issue addressed by the 1st Respondent is on whether the Applicants are entitled to the conservatory orders sought pending the hearing and determination of the Petitions herein.

105. They submitted that the applicants have not met the threshold for issuance of conservatory orders, in that they have not established a prima facie case, that there is prejudice/irreparable harm, loss or damage if the orders sought are not granted and that public interest does not favour the issuance of the sought orders.

109. In this regard they rely in the cases of **Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR , Anarita Karimi Njeru v. Republic [1979] eKLR , Kevin K. Mwiti & others v Kenya School of Law & others [2015] eKLR , Tesco Corporation Ltd. vs. Bank of Baroda (K) Ltd., [2009] eKLR**, **Centre for Rights Education and Awareness (CREAW) & 7 others V Attorney General [2011] eKLR and Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others (supra)**. In sum they urged the court to dismiss the applicant's applications with cost.

2nd Respondent Case:

110. The 2nd Respondents on their part opposed the instant applications through their replying affidavit sworn by Dr. Muia and their written submissions. Counsel Dr. Nyaundi appeared on their behalf and highlighted their submissions, where they identified three issues for determination.

111. The first issue is on whether the applicants have met the threshold for a grant of conservatory order. In this respect they submitted that interim orders are not automatic, and are issued after intensive consideration of the merit of each case and that for issuance of any interlocutory reliefs one must establish a case with likelihood of success on the merits, a risk of irreparable harm and a balance of convenience that tilt in their favour.

112. They rely in the following cases **Gatirau Peter Munyya vs Dickson Mwenda Githini & 3 others(supra), Centre for Rights Education and Awareness (CREAW) & 7 others V Attorney General(supra) and County Assembly of Machakos v Governor Machakos County & 4 others [2018] eKLR.**

113. The second issue addressed by the 2nd Respondent is on whether a prima facie case has been established by the applicants. In this regard they submitted that a cursory look at the petition does not reveal any sound evidence of variance between the census numbers as alleged, and that the petition is grounded on speculations, conjecture and suppositions.

114. Additionally, they submitted that it is only the 1st Respondent who has the mandate to conduct statistics and census and therefore the numbers alleged that differ from the released numbers have not been duly explained on how they were contrived.

115. And that the applicants' application for scrutiny of the tablets and storage chips used during the census exercise is without any basis but a fishing expedition, that is grounded on unjustified apprehension, speculation, suspicion and baseless mistrust which has no basis in law and cannot justify the grant of the sought conservatory orders. They rely in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (supra).**

116. The third and final issue addressed by the 3rd Respondent is on whether the applicants shall suffer prejudice if the sought orders are not granted. In this regard they submitted that the applicants have not demonstrated that they would suffer any prejudice if the orders sought are not granted and that public interest demands that the court disallows the same as in any event this court can award compensation in monetary terms if the petition succeeds.

117. Additionally, they submitted that the orders sought against the 2nd Respondent cannot be issued as the horse has already bolted, in that the budgetary process has already commenced as provided for under section 125 and 35 of the Public Finance Management Act, 2012, which budget process they submit is at the tail end as of 11th June, 2020 as the National budget has been prepared and submitted to the National Assembly for approval, and any attempt seeking to stop the process would not only be detrimental to the 3 Petitioners counties but the other 44 Counties who would be prejudiced and are not parties to this petition.

118. It is their case that the Divisions of Revenue Act has been enacted and all the budgetary process completed. Further, they submitted that a conservatory order restraining the use of the 2019 Census Data, in determining the revenue division for the 2020/2021 financial year, would be synonymous with making a final order on revenue division on an interim basis, before the facts of the matter have been determined.

119. In sum they urged the court to dismiss the instant applications with costs.

3rd Respondent Case:

120. The 3rd Respondent also opposed the instant applications, relying heavily in the replying affidavit of Dr. Shadrack Mose Sichei dated 12th June, 2020 and their filed written submissions.

121. Counsel Mr. Nyamodi highlighted their submissions where they identified only one issue for determination, which is as to whether interim conservatory order sought by the Petitioners applicant against the 3rd Respondent can be granted.

122. They submitted that the 3rd Respondent is an independent commission whose mandate under Article 216 (1) of the Constitution is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County Governments and among the County Government and at Article 216(5) to submit its recommendations to the Senate, the National Executive, County Assemblies and Executives.

123. It is their case that the 3rd Respondent, in exercising its mandate under Article 216 (1) of the Constitution, made Recommendations on the Basis for Equitable Sharing of Revenue Between National and County Governments "the Vertical Recommendations" for financial year 2020/2021 and the Third Recommendations on the Criteria for Sharing of Revenue among Counties for Financial Years 2019/2020, 2020/2021, 2021/2022, 2022/2023 and 2023/2024 "the Third Basis Horizontal Recommendations for Financial year 2019/2020 to 2023/2024" following a very elaborate consultative process.

124. Further they submitted that in accordance with Article 216 (5) of the Constitution, the 3rd Respondent submitted the Vertical Recommendation for financial year 2020/2021 to the Senate, National Assembly, Treasury and all the 47 County Government vide a letter dated 18th December, 2019 and the Third Basis Horizontal Recommendations for Financial year 2019/2020 to 2023/2024 was submitted to the Senate vide a letter dated 3rd April, 2019 for consideration by the Senate.

125. It is their case that from the instant application the applicants are seeking interim order to restrain the 3rd Respondent from formulation and/or making recommendation for sharing of revenue between the National Government and the County Governments and among County Governments, which process they submit the 3rd Respondent had already completed and submitted its recommendations to other government agencies for their further action.

126. Counsel submits that the interim order sought by the Petitioners Applicants against the 3rd Respondent has been overtaken by events as the recommendations and policies by the 3rd Respondent have already been submitted to other Governments agencies/institution.

127. The said interim order sought against the 3rd Respondent cannot therefore be issued as this Honourable Court cannot issue orders in vain and that would be ineffective for practical purposes. They relied in the following cases; **Ruth Nyambura Chuchu & 2 Others vs Stephen**

Gathoga Chuchu Alias Stephen Mungai Githu [2015] eKLR, M/S Gusii Mwalimu Investment Co. Ltd & 2 Others vs M/S Mwalimu Hotel Kisii Ltd [1996] eKLR, Aluoch Polo Aluochier vs Attorney General [2018] eKLR.

128. Furthermore, it is submitted for the 3rd Respondent that there is no prejudice whatsoever that the Petitioners Applicants will suffer if the interim order sought against the 3rd Respondent in their Application are not granted as the 3rd Respondent in making Third Basis Horizontal Recommendations for Financial year 2019/2020 to 2023/2024 used the 2009 census results and not the 2019, which is the subject matter of the instant Petition.

129. Therefore, the share of revenue among the County Government for the next five financial years will be based on the 2009 census incase the 3rd Respondent's recommendations are adopted and considered by the Senate.

130. Moreover, it is their submissions that, population is not a factor the 3rd Respondents considers in making the Vertical Recommendations and as such, the 2019 census result has absolutely no bearing whatsoever on the formulation of the said recommendations. In sum, it is their submissions that the Petitioners applicants have not demonstrated any serious prejudice they will suffer if the conservatory order sought against the 3rd Respondent are not granted and urged the court to dismiss the same.

4th Respondent Case:

131. The 4th Respondent opposed the instant applications and through their written submissions highlighted by Counsel Mr. Mukele submitted that this court jurisdiction to grant conservatory orders ought to be exercised pursuant to the established principles and the court must take into account public interest, constitutional values, the magnitude of its decision and whether the conservatory orders should be granted as a matter of priority.

132. They relied in the cases of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others(supra) and Muslims for Human Rights (MUHURI) & 4 others vs Inspector General of Police & 2 others [2014] eKLR.**

133. They went ahead and identified two issues for determination. The first issue is on whether the census information supplied to the 4th Respondent by the 1st respondent is to be relied upon for purposes of review and delimitation of boundaries.

134. It is their submissions that Article 89(2) and (3) of the Constitution bestows the 4th Respondent with the mandate to review the number, names and boundaries of Constituencies and wards and more importantly article 89(5) and (6) and (12) directs the 4th Respondent to use the populations numbers for purposes of population quotas in boundaries review.

135. It is their submissions that they received the 2019 enumerated census results from the 1st Respondent in a manner that meets the test of practical utility for purposes of the delimitation and review of boundaries. In this they rely in the case of **Republic vs Kenya School of Law [2019] eKLR.**

136. The second issue addressed by the 4th Respondent is on whether this court should issue conservatory orders against the 4th Respondent. In this regard, they submitted that Article 89(2) of the Constitution provides for strict timelines for review of names and boundaries of constituencies, in that the same shall be at intervals of not less than eight years, and not more than twelve years, and that any such review shall be completed at least twelve months before a general election of members of Parliament.

137. In this respect, they submitted that having received the enumerated census results from the 1st Respondent, they have since begun internal administrative process to lay the roadmap for the review and delimitation of Constituency and county assembly wards in accordance with the dictates of the Constitution, and that they are currently in the process of analyzing and evaluating the data, undertaking the desk review and compiling and developing different scenarios for the exercise.

138. They urged the court not to interfere with their process in view of strict timelines and the fact that substantial part of their preparation is not dependent on census results. And that the court should desist from issuing orders whose effect is to micro manage independent bodies.

139. In this regard they relied in the cases of **Diana Kethi Kilonzo & Another vs Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR, Samson Owimba Ojiayo vs Independent Electoral Boundaries Commission [2013] eKLR and Anderew Shiroko Shilenje vs County Government of Kakamega & Another [2015] eKLR.**

140. Additionally, it is their submissions that the applicant's petitioners petition demonstrates that there are no allegations raised against the 4th Respondent on denial, violation or infringement of their fundamental rights and freedoms and that no nexus has been established in connection with the 4th Respondents regarding any threatened violations or denials of rights.

141. In sum, it is their submissions that the applicants have not established a prima facie case and urged the court to dismiss the instant application with costs and instead expedite the hearing and determination of the petition.

5th Respondent Case:

142. The 5th Respondent opposed the instant applications by the petitioners on several grounds. Through State Counsel Mr. Ogosso, who highlighted the submissions on behalf of the Attorney General, they addressed the following issues.

143. They first urged the court to consider the established principle for grant of conservatory orders as espoused by the courts in the cases of **Simeon Kioko Kitheka & 18 others vs County Government of Machakos & 2 Others [2018] eKLR, Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR Okiya Omtatah Okoiti & Another vs President of Kenya & 2 Others [2016] eKLR and Kevin K. Mwiti & Others vs Kenya School of Law & 2 Others [2015]eKLR.** It is their case that the applicants petition and applications do not meet the criteria set for issuance of the sought conservatory orders.

144. The second issue addressed by the 5th respondent is the allegation that the applicants' application for access to information has been filed without following the laid down procedure provided for under the Access to information Act Under part III and Iv, which procedure provides for the applicants to first approach the Commission on Administrative Justice in the event a public body denies one information sought.

145. In this regard they submit that the instant application fails under the exhaustion doctrine, and urged this court to exercise restraint relying in the cases of **Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR, Pastoli vs. Kabale District Local Government Council and Others [200 8] 2 EA 300, Jackson Maina Ngamau v Ethics and Anti-Corruption Commission & 3 others [2015] eKLR ,Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR and Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR.**

146. Additionally, the 5th respondent submitted that the information sought by the applicant for scrutiny are information that are confidential and prohibited from disclosure under section 6 of the Access to Information Act, and that allowing the instant application will undermine the National Security of Kenya as the information will impeded the due process of the law, create unwarranted invasion of the privacy of individual data, infringe professional confidentiality as recognized in law or by rules of a registered association among others.

147. And that the information sought and allegedly released to the applicants by census officials are illegal and do not fall within the protection envisaged under section 16 of the Access to information Act.

148. It is their case that the court before granting the sought orders, ought to consider the impact of allowing the applicants experts to access the 1st Respondent servers, which act they submit violates section 22 and 23 of the Statistics Act and Schedule 4 thereof.

149. Additionally, they submitted that, the limitations on access to information under Article 35 of the Constitution as permitted by inter alia Section 6 of the Access to Information Act, 2016 and Sections 22 and 23 of the Statistics Act, 2006 as amended by the Statistics (Amendment) Act, 2019 are reasonable and justified in an open and democratic society.

150. In any event, the same have satisfied the criteria set out in Article 24 of the Constitution of Kenya. They relied in the cases of **Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR, Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR and Deynes Muriithi & 4 others v Law Society of Kenya & Another [2016] eKLR.**

151. Furthermore, the 5th Respondent submitted that the failure by this court to issue the sought orders will not render the petition nugatory as the orders sought in the application are also sought in the petition and that the petitioners have not successfully demonstrated the same. In this they rely in the case of **John Harun Mwau vs Linus Gitahi & 13 others [2016] eKLR.**

152. Moreover, they submitted that under the applicable laws, the acts of the Bureau enjoy the presumption of legality and as such and until such a time that the contrary may be proved, the 2019 KPHC results as published by the Bureau are the legitimate and lawful statistical data that can be lawfully relied upon and used by any authorized entity. The attempt to impugn the legitimate acts of the Bureau at an interlocutory stage is unlawful and without merit.

153. In sum the 5th Respondent submitted that the applicants have failed to establish a prima facie case to warrant this court to issue sought orders and urged the court to strike the applications.

Analysis and Determination:

154. I have carefully considered the grounds upon which the application for conservatory orders herein are based, the parties' rival affidavits and submissions and it is my view that the issue the court is called upon to decide at this point is whether the Applicants have met the conditions for the grant of conservatory orders as sought**.**

155. As submitted by the parties herein, this Court is granted powers to issue conservatory orders in constitutional petitions under Article 23 (3)(c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules).

156. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicants herein have made out a *prima facie* case to warrant grant of conservatory orders sought. I am also at this stage required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

157. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** in regard to conservatory orders noted as follows:

> **"[86] *"Conservatory orders"* bear a more decided *public-law* connotation: for these are orders to facilitate ordered**

> **functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest.* Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes."***

158. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others (supra),** Justice Onguto (as he was then) gave a detailed view of the applicable principles in an application for a conservatory orders. These are that the Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice.

159. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

160. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.

161. Additionally, am also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law as was espoused in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others (supra)** that: -

> **"...It is important to point out that the arguments that were advanced by Counsel and that *I will take into account in this ruling relate to the prayer for a Conservatory Order* in terms of prayer 3 of the Petitioner's Application and not the Petition. *I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

162. As it has been held in various decisions, a *prima facie* case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

163. It is apparent to me that in this instant case, the petitioners' applicants are basically challenging the 1st Respondent 2019 Kenya Population and Housing Census results for the Counties of Mandera, Garissa and Wajir on the basis that the released population census results for the areas does not reflect the actual enumerated population by the census officials.

164. For instance, in the case of Mandera County, they submitted that the actual enumerated results are 1,772,708 yet the published figures by the 1st Respondent is 867,457 a variance of 905,281.

165. As for Garissa County they submitted that the actual enumerated figure was 969,313 in four listed sub counties of Garissa Township, balambala, Lagdera and Daadab and the released figure by the 1st Respondent is 431, 471 a variance of 537, 575.

166. And in Wajir County the variance was also experienced in various places, for instance in Tarbaj Constituency the actual enumerated population was 271,856 and the 1st Respondent published figure is 57,232, in Wajir East actual enumerated is 207, 362 and released figure by 1st Respondent is 110, 654 a variance of 96708 and in Eldas actual enumerated is 214, 482 and the released figure is 88,509 with a variance of 125, 973.

167. They contend that the 1st Respondent in the 2019 KPHC mobilized the local leaders in this case the members of parliament who are among the petitioners herein and involved them in the mobilization of the people to participate in the census exercise.

168. Therefore, due to their role they were in constant contact with the 1st Respondent census officials who were able to share with them the daily returns enumerated in their respective areas, which information they allege was released to the them and is protected pursuant to section 16 of the Access to information Act.

169. It is this information that they allege indicates that the census results released by the 1st Respondent is different from what was actually enumerated. They also rely in the ANASTRA report which points out that the enumerated population census for the three counties of Mandera, Garissa and Wajir may not have made it to the 1st Respondent central servers due to poor network related issues common in the North Eastern Part of the Country.

170. Additionally, and in support of their position, they allege that the 1st Respondent has in the past attempted to suppress the population of the three counties of Mandera, Garissa and Wajir, that is by attempting to cancel the 2009 census results for eight districts in the region.

171. Another attempt was in April, 2016 which actions were both stopped pursuant to their successful litigation in court. It is their position that the 2019 KPHC results as released is another attempt by the 1st Respondent to suppress their population.

172. Further, they allege that the census report as released does not reflect the true position in the ground as regarding the population of the

three counties of Mandera, Wajir and Garissa which when compared to the 2009 census results.

173. The 2019 census results as released has reduced significantly and therefore the same cannot be credible going per the 2014 Kenya Demographic and Health Survey and the 2015-16 Kenya Integrated Household Budget Survey which showed that the three counties had the highest population growth in comparison to other parts of the country.

174. Furthermore, it is their allegation that the use of technology by the 1st Respondent to undertake the 2019 KPHC did not meet the provisions of the law as it was not anchored in any law and that the same did not meet the public participation requirement enshrined in the constitution.

175. It is therefore clear to me that the main challenge in the applicant's petition is the manner in which the 1st Respondent conducted the 2019 KPHC for the three counties of Garissa, Mandera and Wajir and whether the results thereof are credible and meets the legal threshold provided for in the Constitution and the law.

176. It is clear to me without saying more that this petition discloses *prima facie* arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable.

177. Consequently, the next issue for me to consider is as to whether the Applicants have satisfied the provisions of Article 23(3)(c) of the Constitution and rule 23 of the Constitution of Kenya (Protection of the Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

178. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 others (supra)** a party seeking a conservatory order only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against the public interest.

179. In the present applications, three main arguments have been advanced based on the specific conservatory orders being sought by the applicants; these can be categorized into three.

180. The first interim relief sought by the applicants 'is an order restraining and prohibiting the 2nd and 3rd Respondents from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th November 2019 in the determination of division of revenue between National and County Government or in the formulation of any policies, reports and/or recommendations pending the hearing and determination of the petition.

181. Though during submissions, the applicants without amendment to their applications apparently sought an order to stop the use of the 2019 KPHC report for Mandera, Garissa and Wajir by the Senate in the horizontal division of revenue during the enactment of the County Allocation of Revenue Bill, which is still pending.

182. The second one is an order stopping the 4th Respondent from using the impugned 2019 KPHC report to conduct delimitation of boundaries pending the hearing and determination of this petition and thirdly an order pursuant to Article 35(1) of the Constitution allowing the applicants to access and scrutinize the data held by the 1st Respondent on daily census returns for the disputed areas in the three counties as petitioned herein, that is the gadgets in use between 24th-31st August, 2019.

183. In regard to the first interim reliefs sought, the 2nd Respondent in their case averred that the orders sought herein if issued would be in vain as the horse has already bolted. They allege that the budgetary process is at the tail end, therefore any orders issued would be inconsequential at this stage.

184. The 3rd Respondent on the other hand are also opposing the instant application and vide an affidavit sworn by Dr. Shadrach Mose Sichei, they aver that in coming up with the Division of Revenue Act and generating the 3rd Formula to be used up to the year 2023/2024 the population census used by the 3rd Respondent was the 2009 census report as by the time the formula was generated in April 2019, the 2019 census results were not available, and therefore urged the court not to issue the sought interim orders in this respect.

185. The applicants on the other hand have pointed out that if the orders are not issued, they would suffer immense prejudice, as the 1st Respondent 2019 KPHC if used would occasion them loss of their equitable share of resources, for instance the County of Mandera would lose Kshs. 1.3 Billion and Garissa County Kshs. 1Billion annually, as a consequence it would seriously affect their delivery of services and therefore it is in the public interest for this court to issue the orders sought herein.

186. On whether there is possibility of the 2019 KPHC being used in county allocation of revenue, a position contradicted by the 3rd Respondent, the applicants submitted that there is a high chance for the use of the 2019 KPHC in this regard, they refereed the court to page 566 of the 8th Petitioners bundles of documents where the 3rd Respondent states: -

> **"Table 12 presents the determination of each County's equitable share in the county share of revenue based on the CRA recommendation on the third basis as submitted to parliament in April, 2019. However, given that parliament has not approved the third basis, these allocations will change with the use of the population census data for 2019"**

187. It is therefore clear to me that there is still a chance the Senate in enacting the County Revenue Allocation Bill might use the 2019 KPHC and therefore the issue is alive and the petitioner's applicants' arguments appear to have some merit.

188. On the second category of the relief sought herein, is an interim order stopping the 4th Respondent from using the impugned 2019 KPHC report to conduct delimitation of boundaries pending the hearing and determination of this petition.

189. The 4th Respondent in this regard averred that they have received the 1st Respondent 2019 KPHC report and that they are currently using the same internally for administrative purpose and generating population quotas that they intend to use in the upcoming boundaries review and delimitation.

190. They submitted that the report is practicable and urged the court not to make an order interfering with their operation and opposed the instant applications.

191. The applicants on the other hand are alleging that if this court does not issue the orders sought against the 4th Respondent, they stand prejudiced as the impugned 2019 KPHC will be used in review and delimitation of boundaries affecting their right to representation protected in the Constitution.

192. The third interim orders sought herein are in regard to access and scrutiny of gadgets used by the 1st Respondent during the 2019 KPHC in the disputed areas identified in the three counties herein.

193. The petitioners are seeking to scrutinize the mobile gadgets and other gadgets to ascertain the daily enumeration figures forwarded by the census officials to the 1st Respondent central servers during the period 24th -31st August, 2019.

194. The basis for this is their allegation that there was substantial variance between the 2019 KPHC report released by the 1st Respondent and the actual enumerated results during the period based on the information released to them by the 1st Respondent officials in the ground.

195. It is on this basis that they are seeking this court to order for scrutiny to ascertain the credibility of the 1st Respondent 2019 KPHC report for the disputed areas in the three Counties of Mandera, Garissa and Wajir.

196. In answer to this, the Respondents averred that this court lacks the jurisdiction to determine the applicants' application for scrutiny, which application is based on Article 35 of the Constitution and the Access of Information Act, which at section 14 of the act provides that the applicants upon being denied the sought information herein ought to have filed an appeal before the Commission on Administrative Action, whose decisions and orders are enforceable like an order of the High court.

197. It is on this basis that they submit that this Court lacks the jurisdiction to determine this application for scrutiny and access to information as the applicants ought to have followed the procedure laid down in the Access to Information Act.

198. Mr. Nyamodi reiterated that even if there are exception to the provisions of section 14 of the Access to Information Act as was held in the case of **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR,** the instant case does not meet the exception, as the applicants in this case received a response from the 1st Respondent and they ought to have filed for review before the commissions, unlike in the case of **Katiba Institute** where the public body concerned did not respond to the request for information.

199. The 5th Respondent on the other hand opposed the instant application for scrutiny citing national security interest, which tilts the public interest consideration for disallowance of the orders sought.

200. Furthermore, the respondents are alleging that the orders sought in the application are similar to the orders sought in the petition and the net effect is that if the orders are issued, they are capable of determining the petition at the interlocutory stage.

201. In this regard **Article 35** of the Constitution provides that;

> **1) "Every citizen has the right of access to -**
>
> > **a) information held by the State; and**
> >
> > **b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**
>
> **2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
>
> **3) The State shall publish and publicize any important information affecting the nation.**

202. In actualizing Article 35 above, parliament enacted Access to Information Act 2016. Section 2 of the Access to Information Act defines "*information*" as to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production; Section 4 of the Act provides for the procedure to access information.

203. In this case there were requests for information from the 9th-15th Petitioners vide letters dated 2nd , 3rd and 4th December, 2019, where they sought to be provided with mobile devices , list and number of enumerators used, company contracted to provide software, copy of test report for each mobile device, copy of each daily transmission report for each mobile devise, exit report for each mobile devise, certificate of successful transmission for each mobile devise and audit report for each mobile devise deployed for enumeration exercise in Eldas, Tarbaj,

Wajir East, Wajir West and Wajir North Sub counties.

204. The 1st Respondent made a response to one of requests vide a letter dated 9th December,2019 disallowing the request stating that the request was at variance with the fundamental principle of official statistics and that it was unlawful to request for the period in question.

205. Counsel Mr. Issa submitted that their request for information is not for confidential information, but for the number of people enumerated as evidenced by the daily returns that were transmitted to the servers, that is the aggregated daily returns for the period 24th -31st August, 2019.

206. In this regard the 1st and 5th Respondents contend that the information sought is limited by section 6(1)(a) and 6(2)(1) of the Access to information Act. Section 6(1) of the Access to Information Act provides that Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to;

a) undermine the national security of Kenya

b) Will undermine the national security of Kenya in that;

c) endanger the safety, health or life of any person;

d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

h) damage a public entity's position in any actual or contemplated legal proceedings; or

i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

207. Section 6(2) on the other hand defines the information that may be considered relating to National security, it includes information relating to;

a) military strategy, covert operations, doctrine, capability, capacity or deployment

b) foreign government information with implications on national security

c) intelligence activities, sources, capabilities, methods or cryptology

d) foreign relations;

e) scientific, technology or economic matters relating to national security;

f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;

g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;

h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;

i) cabinet deliberations and records;

j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;

k) information that is referred to as classified information in the Kenya Defence Forces Act; and

l) any other information whose unauthorized disclosure would prejudice national security

208. Section 6(4) provides that ***despite anything contained in subsections (1) and (2) of the Act above, a public entity or private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court.***

209. Section6(6) states that in considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—

a) promote accountability of public entities to the public

b) ensure that the expenditure of public funds is subject to effective oversight;

210. In regard to the parameters of public interest definition, the Supreme Court of India in **Thaware v State of Maharashta, Indian &Others [2004] INSC 755 S.C 755 of 2004** adopted the meaning of public interest as set out in Stroud's Judicial Dictionary Vol. 4 (v Ed) as:

"A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

211. It is therefore clear to me based on the foregoing that it is up to the respondents to demonstrate how the information sought affected state security and therefore, falls within the provisions of section 6 of the Act above.

212. To revisit the Respondents contention on this court jurisdiction to determine the Applicants request for scrutiny and information pursuant to section 14(1)(a) of the Access to Information Act, I agree with the Decision of Justice Chacha Mwita in **Katiba Institute v Presidents Delivery Unit & 3 Others (supra),** that there is no condition precedent from the reading of the Access to Information Act triggering the jurisdiction of this Court, and thus pursuant to Article 165(3)(b) this court has unlimited jurisdiction to determine the question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, therefore I find the respondents position in this regard not tenable.

213.. In the present petition, the petitioners have alleged that their application for scrutiny and information is hinged on Article 35(1) of the Constitution which provides for access to information.

214. That upon being granted the sought orders, they will be able upon scrutiny to establish the falsity in the figures released by the 1st Respondent, and that it is when they will proceed to enforce their rights under Article 35(2) on deletion and or correction of false information held by a public body. This is what the respondents have described as fishing expedition, which in my view I disagree.

215. In Nairobi **Law Monthly v Kenya electricity Generating Company & 2 Others (supra)** the Court stated of what the state should bear in mind when considering the request to access information.;

"34. The…consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicize any important information affecting the nation', but also to provide open access to such specific information as people may require from the State…

36. The recognized international standards or principles on freedom of information,… include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

216. Its significance as a founding value of constitutional democracy was dealt with by the Constitutional Court of South Africa in the case of **President of Republic of South Africa v M & G Media CCT 03/11** where the Court stated that: -

"[10]. The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realization of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

217. Additionally, Justice Chacha Mwita **In Katiba Institute v Presidents Delivery Unit & 3 others** (supra), aptly captured its importance when he noted that: -

"28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right

enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

29. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access."

218. Additionally, in **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR,** the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated;

"[270] Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information".

219. Further, the right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of **Brummer v Minister for Social Development & Others** (supra) where the Court stated;

"[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."

[63] Apart from this, access to information is fundamental to the realizations of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas."

220. The applicants in regard to their enumeration figures herein have relied on Section 16(1) of the Access to Information Act which provides that a person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.

221. The Respondents contend that any information adduced in regard to the 2019 KPHC which does not originate from the 1st Respondent cannot be believable as the same is a preserve of the 1st Respondent and any such information is out of a breach of an oath of secrecy. Indeed, the variance established raises issues that calls for this court attention at this stage.

222. I agree with the submissions of Mr. Biriq as was held by the Chief Justice of South Africa in the case of **My Vote vs Minister of Justice & Correctional Services & Another, Constitutional Court case CCT/249/17** that:

"if secrecy thrives, then our Constitutional project would be at risk of being betrayed or shipwrecked."

CONCLUSION:

223. In sum, it is trite that Conservatory orders are intended to help create and or maintain a given state of affairs pending the hearing of the main suit. In this case, I note that they are intended to help secure and protect the rights and freedoms under the Constitution.

224. The first set of relief sought is with regard to the conservatory order for restraining and prohibiting the 2nd and 3rd Respondents from relying on, utilizing or in any way using the 2019 Kenya Population and Housing Census (KPHC) results published by the 1st Respondent on the 4th of November 2019 in the determination of the division of revenue between National and County Government or in the formulation of any policies, reports and/or recommendations pending the hearing and determination of this petition.

225. It is not denied that, the 3rd Respondent in making Third Basis Horizontal Recommendations for Financial year 2019/2020 to 2023/2024 used the 2009 census results and not the 2019, which is the subject matter of the instant Petition.

226. Therefore, the share of revenue among the County Government for the next five financial years will be based on the 2009 census incase the 3rd Respondent's recommendations are adopted and considered by the Senate.

227. Moreover, it is not disputed that, population is not a factor the 3rd Respondents considers in making the Vertical Recommendations and as such, the 2019 census result has no bearing whatsoever on the formulation of the said recommendations.

228. Additionally, as regards the orders sought against the 2nd Respondent cannot be issued as the horse has already bolted, in that the budgetary process has already commenced as provided for under section 125 and 35 of the Public Finance Management Act, 2012, which budget process they submit is at the tail end as of 11th June, 2020 as the National budget has been prepared and submitted to national assembly for approval.

229. That any attempt seeking to stop the process would not only be detrimental to the 3 Petitioners counties but the other 44 Counties who would be prejudiced and are not parties to this petition.

230. Further I agree with what is deponed to in the 2nd respondent replying affidavit para (15) that, blocking or obstructing the allocation of revenue to the counties will pose a crisis to the operations of counties especially during the prevailing coviD-19 pandemic, the floods, the locusts among other disasters being experienced in the country of which this court takes judicial notice of.

231. It is not denied that the Divisions of Revenue Act has been enacted and all the budgetary process completed. The 2nd respondent also affirms that this court can award compensation in monetary terms if the petition succeeds.

232. In sum, the Petitioners/applicants have not demonstrated any serious prejudice they will suffer if the conservatory order sought against the 2nd and 3rd Respondents are not granted.

233. In any event if Senate adopts element of 2019 census in allocation of resources contrary to the 3rd respondent recommendations, and the instant petition is successful there is no bar to the petitioners seeking compensation for the loss occasioned from whoever will be found to have occasioned it including Kenya government.

234. On the issue of stopping the delimitation of boundaries by the 4th Respondent I listened to the parties' submissions and especially the 4th Respondent advocate Mr. Mukele and Mr. Isssa for the petitioners and it emerged that the 4th respondent has got long way to start the process as even the finances have not been allocated for the process nor has it set the time table for the same.

235. The 4th respondent chairman statement of 14/2/2020 intimated that it intended to commence the process of the boundary review from march 2020 however same was subject to budget allocation. The 4th respondent has a span of up to 2024 under the constitution Art 89 to undertake the exercise. See vol 2 –mam 10 in pet no 107 of 2020.There is no evidence that the budget allocation for the exercise has been done.

236. The petition is very likely to be heard and determined before the process starts. Thus, no prejudice to be suffered by the petitioners if the orders are not issued at this moment. They can always move court if same commences before petition is determined.

237. On the issue of scrutiny and access to information, the same is crucial in determining the fate of this petition and it is viable that the results of the scrutiny as submitted by the applicants can be used to determine their rights under Article 35(2) of the Constitution.

238. Am also guided by the decision of the **European Court of Human Rights** in ***Youth Initiative for Human Rights v Serbia*** (Application No 48135/06), cited by Justice Chacha Mwita **In Katiba Institute v Presidents Delivery Unit & 3 others** (supra) where it was stated in this regard thus: -

> **"The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions…The access to information law should, to the extent of any inconsistency, prevail over other legislation…National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who willfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law."**

239. The first respondent, submitted that the nature of the access sought by the Applicants is not contemplated under the relevant substantive law and is thus unsanctioned. Of course, this meant that the scrutiny sought by the petitioner applicants is unsanctioned by law.

240. That can easily be answered by the provisions of Article 20(3) which provides: '**[I]n applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to the right'**. Though provisions of article 35 and provisions of statistics Act do not provide expressly for the scrutiny the court is of the view that in appropriate cases and circumstances the devices, tools and instruments of the respondent put in use in conducting, collection and storage of statistics and census may be ordered to be scrutinized for interest of justice and to give effect to a right.

241. And also, to actualize the constitutional principles on the need to promote accountability of public entities to the public vide Section 6(6) (a) of Statistic Act.

242. Not forgetting the provisions of Article 259. Which provides **(1) This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles;(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) *permits the development of the law;* and (d) contributes to good governance.**

243. The upshot of the foregoing is that am satisfied that an element of a *prima facie* case has been made out by the Petitioners and that they are likely to suffer prejudicial effect that would result from the 1st Respondent impugned 2019 KPHC results if access to information of daily

data collected via the tablets on the enumeration areas in issue and the figures thereof captured by 1st respondent central servers is denied.

244. In this respect this court is inclined to issue the orders sought in respect to the access to information, save for the same order of access to information, shall at this stage only apply and limited to figures enumerated in areas in issue and what 1st respondent central servers have captured from same areas but not any information on individuals, that would be considered intrusion of privacy under the law and the Constitution.

245. Thus, the court makes the following orders;

(A) The prayers on conservatory orders against respondents 2,3 and 4 are declined with a rider that should the 4th Respondent start the delimitation of the boundaries before petition herein is heard and determined, the petitioners will be at liberty to seek the same relief.

(B) On scrutiny and access to information sought from the 1st respondent, the court at this stage makes the following orders;

I) The petitioners via their appointed IT experts and under the supervision of this court via the deputy registrar of the court shall be allowed by the 1st respondent access to central servers and the tablets and/or devices which were used to collect data during the 2019 KPHC exercise between 24/8/2019 to 31/8/2019 for the areas in issue namely; -

-Mandera West, Banisa, Lafey, Mandera East and Mandera North sub counties.

- Garissa Township, Balambala, Lagdera and Dadaab sub counties

- Eldas, Tarbaj, Wajir East, Wajir West and Wajir North 'sub counties'(constituencies)

II. The petitioners will appoint the IT experts either jointly (one for each county) in issue or as they may agree but not to exceed a maximum of 3 and will team up with the Deputy Registrar of this court in gathering the data (in figures of people enumerated) in the devices/tablets and the 1st respondent central severs for the areas in issue (I) above in the next 30 days.

III. A joint report by the petitioners' IT experts and this court Deputy Registrar on the exercise and figures gathered of people enumerated areas in issue as captured in tablets /devices and central servers accessed shall be filed within 30 days from the date of this ruling.

IV. The 1st respondent will be at liberty to file report on the same data within the prescribed period above.

V. There will be liberty to apply.

(C) Costs in the main cause.

(D) The petition to be heard on priority basis.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JUNE, 2020.

……..

C. KARIUKI

JUDGE